No. 83-2067

In the Supreme Court of the United States

OCTOBER TERM, 1984

TAMER MOURAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MERVYN HAMBURG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's sentence for engaging in a continuing criminal enterprise and for various substantive charges that served as predicate offenses for the continuing criminal enterprise count violates the Double Jeopardy Clause.

2. Whether the district court's instructions to the jury on the "continuing series of violations" element of the continuing criminal enterprise count were erroneous.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 729 F.2d 195.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1984. A petition for rehearing was denied on April 18, 1984. The petition for a writ of certiorari was filed on June 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a two-month trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count (count 3) of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (designated in the courts below as the Group A count); one count (count 2) of conspiracy to import heroin

and three substantive counts (counts 4, 7, and 10) of importation of heroin, in violation of 21 U.S.C. 952, 960, 963 and 18 U.S.C. 2 (the Group B counts); one count (count 1) of conspiracy to distribute heroin and four substantive counts (counts 5, 8, 11, and 12) of distribution of heroin, in violation of 21 U.S.C. 812, 841, 846 and 18 U.S.C. 2 (the Group C counts); and four counts (counts 6, 9, 13, and 15) of travel in interstate commerce and use of interstate facilities to promote and facilitate drug offenses, in violation of 18 U.S.C. 1952 and 2 (the Group D counts). On the CCE count, he was sentenced to a term of 40 years' imprisonment and a fine of $50,000; on the Group B importation counts, a total term of 45 years' imprisonment, concurrent with the CCE sentence, and a fine of $50,000; on the Group C distribution counts, a total term of 45 years' imprisonment, concurrent with the above sentences; and on the Group D Travel Act offenses, a total term of 20 years' imprisonment, concurrent with the above sentences. In addition, on the substantive importation and distribution counts, petitioner received a lifetime term of special parole. See Pet. App. 20a. The court of appeals affirmed petitioner's convictions in all respects; however, it vacated the sentences on the importation conspiracy and distribution conspiracy counts under *Jeffers* v. *United States*, 432 U.S. 137 (1977), and remanded for the district court to consider whether to increase petitioner's sentence on the CCE count in light of the vacation of the conspiracy sentences (Pet. App. 1a-20a).[1]

1. The defendants in this prosecution "were high ranking figures in an international narcotics smuggling operation that transported a continuous flow of large quantities of

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[1]Petitioner's original aggregate sentence was 45 years' imprisonment, a $100,000 fine, and a lifetime term of special parole; as a result of the court of appeals' decision — subject to petitioner's resentencing by the district court — his sentence is 40 years' imprisonment, a fine of $75,000, and lifetime special parole.

heroin from Lebanon to the United States over a four year period" (Pet. App. 3a). Petitioner, "a Lebanese national, directed the movement of heroin into the United States from Lebanon" (*ibid.*).

The extensive evidence at trial may be summarized as follows. In 1979, petitioner, then residing in Massachusetts, traveled with co-defendant Joseph Hargrave to Lebanon and met with Jamil Hameiah, a refiner of heroin (Tr. 605-608). Hameiah introduced petitioner and Hargrave to Mohamed Berro, a former Lebanese customs official, and Berro's son, Nassif. Mohamed Berro agreed to transport multi-kilogram loads of heroin to petitioner and Hargrave. In addition, the parties agreed to form an export-import company, with offices in New York City and Beirut, which would be used to launder drug proceeds and serve as a cover for the frequent trips to Lebanon contemplated by petitioner and Hargrave. Tr. 613-625. Following the meeting, Nassif Berro obtained from Hameiah a suitcase containing four kilograms of heroin and delivered it to his father in Beirut. Mohamed Berro arranged for an airline pilot to deliver the suitcase to New York. Upon his arrival in New York City, the pilot met with petitioner and gave him the suitcase, retaining one kilogram because petitioner's payment was less than the full amount. Tr. 630-636. Several weeks later, petitioner met Mohamed Berro in Beirut and explained that he had been unable to make the complete payment because Hargrave was concerned that the police were watching them. Petitioner assured Berro that he would be paid for the additional kilogram. Tr. 636-637.

A week later, petitioner, while still in Beirut, told Mohamed Berro that he had purchased four more kilograms of heroin from Hameiah. With Berro's assistance, the heroin was delivered to a relative of petitioner's who resided in Los Angeles. Tr. 637-640. In the fall of 1979, petitioner paid Mohamed Berro $90,000 for his help (Tr. 637-641).

In March 1980, petitioner and Hargrave made another trip to Lebanon. There, they met with petitioner's long-time friend, Mahmoud Yaghi, who arranged for them to transfer $200,000 to a Lebanese banker. Tr. 1254-1258, 1266-1267. Aware of petitioner's complaints about the quality of the heroin furnished by Hameiah, Yaghi introduced petitioner and Hargrave to another source, Suhayl Makkouk. Petitioner and Hargrave were shown 100 kilograms of raw heroin but were told that it could not be processed until Makkouk received necessary chemicals from France. Makkouk agreed to notify petitioner when the refining of the heroin had been completed. Tr. 1260-1265.

In February 1981, Yaghi delivered a sample of Makkouk's heroin to petitioner and Hargrave in New York (Tr. 1281-1282). While in New York, Yaghi witnessed two heroin transactions involving petitioner and Hargrave. One involved a partial payment to petitioner and Hargrave for the sale of six kilograms of heroin furnished by Hameiah; the other concerned the delivery to petitioner and Hargrave of two kilograms of heroin by two individuals, one of whom was a Jordanian steward (Tr. 1293-1294, 1303-1305).

In April 1981, petitioner, accompanied by co-defendant Adnan Yacteen, traveled to Lebanon to meet with Yaghi and arranged for two kilograms of heroin to be smuggled to New York. The courier designated to deliver the heroin was Charles Hunn, a Swiss National. On April 16, Hunn, carrying a false-bottomed suitcase containing heroin, and Yaghi arrived in New York. Yaghi, after losing sight of Hunn in the customs area, proceeded to check into a nearby hotel room and telephoned petitioner to report his arrival. Tr. 1306-1321.

Unbeknownst to Yaghi, Hunn had been detained because customs officials had detected the heroin in his suitcase. Hunn agreed to cooperate with the authorities by making a

controlled delivery. The next day, petitioner and Yacteen drove Yaghi to the hotel where Hunn was staying. Yaghi was arrested when he sought to claim the suitcase from Hunn. Petitioner drove off and escaped detection. Tr. 1306-1321, 1493-1495.

In October 1981, Hameiah dispatched another courier with a false-bottomed suitcase to transport two kilograms of heroin from Lebanon to petitioner. The drugs concealed in the suitcase were discovered in London, but the customs officials permitted the suitcase to be taken to New York. The courier was arrested in New York when he attempted to claim the suitcase. Tr. 1104-1108, 1116-1117.

Additional shipments of heroin were imported by petitioner and Hargrave from Lebanon in 1982. In February, four and one-half kilograms were smuggled without incident (Tr. 2462-2471). In mid-March, a female courier was detected at Kennedy Airport in New York carrying more than two kilograms of heroin intended for delivery to petitioner (Tr. 681-684). In June, petitioner received a shipment of heroin and distributed a portion to Nassif Berro and Berro's associate for resale in New York City; the two dealers were arrested when they attempted to sell the heroin to an undercover DEA agent. Tr. 704, 709-710, 713.

On November 7, 1982, DEA agents, acting pursuant to a warrant, searched petitioner's home in Massachusetts. They discovered one pound of unrefined heroin, quantities of hashish and marijuana, drug paraphernalia, a ledger in which drug transactions had been recorded, and $26,000 in cash (Tr. 81; GX 1-6, 10). Petitioner was arrested and taken to a house of detention to await removal proceedings. While there, petitioner engaged in a lengthy conversation with another inmate in which he described his involvement in drug activities and boasted of his extravagant lifestyle based on the proceeds of his trafficking in narcotics. Petitioner

also revealed a plan to kidnap and torture Mohamed Berro in Lebanon in order to force Nassif Berro, who was cooperating with federal officials after his arrest in New York City, to recant. Tr. 2187-2190, 2210-2214.

2. In its instructions to the jury on the CCE count, the district court summarized the statute and the indictment (Tr. 4705, 4732) and then defined each of the elements of the offense (Tr. 4732-4736). In particular, the court stated that, in order for the jury to convict petitioner on the CCE count, it had to find that he had committed one of the seven substantive importation or distribution felonies charged in the indictment, that the violation was part of a continuing series of drug violations, and that this continuing series of violations provided petitioner with substantial income or resources and was undertaken by petitioner in concert with five or more persons with respect to whom he occupied a managerial or supervisory position (Tr. 4732-4733). The court specifically advised the jury that the term "continuing series of violations" had not previously been covered in the earlier instructions on the other drug offenses (Tr. 4733), and it explained (Tr. 4734, 4735):

> Now, the second element is, if you find that [petitioner committed one of the charged substantive offenses], you have to find in order to convict that this violation was part of a continuing series of violations of the federal statutory provisions.
>
> * * * * *
>
> Now, what's meant by a continuing series of violations. It must obviously be more than one. I instruct you that it must be at least three. Aside from that requirement, it is up to you to use your understanding of the meaning of plain English words and determine whether there was a continuing series of violations.

Petitioner's general objection to this instruction on the "continuing series of violations" element was denied by the district court (Tr. 4795, 4796).

3. The court of appeals affirmed petitioner's convictions (Pet. App. 1a-20a). The court summarily rejected his challenge to the "continuing series of violations" instruction, noting that it had "carefully considered" that and other arguments and found "them to be without any merit whatsoever" (*id.* at 16a).

With respect to petitioner's sentence, the court vacated his punishment on the two drug conspiracy counts in light of *Jeffers* v. *United States*, 432 U.S. 137 (1977) (Pet. App. 15a). However, it rejected his contention that cumulative penalties for CCE and for the substantive crimes that serve as predicate offenses for the CCE count violate the Double Jeopardy Clause (*id.* at 13a-15a). In view of its vacation of the penalties on the conspiracy counts, the court remanded the case to the district court "to reconsider the sentence imposed under § 848 [on the CCE count], keeping in mind that the district court may consider whether to increase the § 848 sentence" (*id.* at 15a; see also *id.* at 16a).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that, under the Double Jeopardy Clause, he could not be sentenced for both the CCE offense and the substantive drug offenses that constituted the predicate violations for the CCE count. That issue is addressed in our brief in opposition (at 14-18) in *Garrett* v. *United States*, cert. granted, No. 83-1842 (Oct. 1, 1984), a copy of which is being sent to counsel for petitioner.

Notwithstanding the grant of certiorari in *Garrett*, we submit that the instant petition should not be held pending decision in that case. Because the court of appeals has remanded for resentencing on the CCE count, the case is currently interlocutory in much the same way that it would

be if the district court had sentenced petitioner for the substantive drug offenses but had not yet imposed sentence for CCE. Cf. *Berman* v. *United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment"). In order to avoid piecemeal review (cf. *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 4-6), petitioner should be required to present this issue to the Court, together with any other claims he may have, after the resentencing proceeding has occurred in the district court.

Moreover, petitioner's resentencing could significantly affect the nature of the issue that he seeks to raise. If, as would be permissible under the remand order,[2] the district court increased the fine on the CCE count to $100,000 (which is the maximum amount authorized by statute, see 21 U.S.C. 848(a)(1)) and made the sentences on the remaining counts run concurrently with the CCE sentence, petitioner would be subject to no greater term of imprisonment or fine than was originally imposed. However, in light of the resentence, his double jeopardy challenge would relate to the propriety of *concurrent* sentences on the substantive and CCE counts rather than, as now, *consecutive* sentences. In this respect, the case differs from *Garrett*, where resentencing on the CCE count could not have resulted in the same incarceration and fine that the defendant initially received (see *Garrett* Br. in Opp. 17-18 & n.17). Thus, since the resentencing proceeding could materially alter the nature of the issue, review at this time would be unwarranted.[3]

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[2]See also *Garrett* Br. in Opp. 16 & n.14.

[3]Because the CCE statute does not authorize a term of special parole, resentencing on the CCE count as discussed in the text could not re-impose the special parole term that petitioner was given on the substantive counts. The petition makes no mention of this issue of special parole, and any concern that petitioner might assert with respect

Even apart from the remand for resentencing, resolution of petitioner's double jeopardy claim in his favor would not necessarily change his overall sentence in any way. As noted in our brief in opposition in *Garrett* (at 9 & n.3), and as the district court charged the jury in this case (see page 6, *supra*) in an instruction that petitioner neither challenged in the lower courts nor contests in this Court, the "series" element of CCE requires that there be three predicate drug offenses. Here, however, petitioner was convicted on seven substantive drug counts. Thus, even if the punishments on three of those seven counts are vacated — and such relief seems the most that the "multiple punishment" component of the Double Jeopardy Clause could require — petitioner's aggregate sentence on the remaining four substantive counts and the CCE count would be unaltered. For example, if the sentences on counts 8, 11, and 12 were set aside (see Pet. App. 20a), his total sentence would be, as it now is (see page 2 note 1, *supra*), a term of 40 years' imprisonment, a fine of $75,000, and a lifetime term of special parole. More generally, this will be true if the sentences on counts 3 (CCE) and 4 (substantive importation) are left standing and any three of the six sentences on the other substantive drug counts are vacated. Disposition of the double jeopardy issue in petitioner's favor would, therefore, be entirely academic.

Accordingly, we submit that the consideration of the first question presented by petitioner should not be deferred pending the Court's decision in *Garrett*. If after resentencing petitioner has a colorable claim of illegality, it may be considered by the court of appeals in light of the revised sentence and, if it is by then available, this Court's decision in *Garrett*.

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to special parole at the expiration of his lengthy CCE sentence would be both premature and speculative at this stage. In any event, as discussed below, petitioner's special parole term would not be improper even if he prevailed on his double jeopardy argument.

2. Petitioner also challenges (Pet. 10-16) the district court's instruction on the "continuing series of violations" element of the CCE offense. He does not deny that the district court advised the jury on several occasions that this is an element of the offense and had to be proven by the government beyond a reasonable doubt. Nor does he contest the court's instruction that a "series" means three or more violations. Rather, he contends (Pet. i) that the court's charge had to "instruct the jury that those violations must be related" in order for the "continuing series of violations" element to be met.

It was not reversible error for the district court to instruct the jury that, in considering whether the series of violations was "continuing," it was "to use [its] understanding of the meaning of plain English words" (Tr. 4735). In general, "[t]he words and phrases in the [CCE] statute are neither outside the common understanding of a juror, nor so technical or so ambiguous as to require a specific definition." *United States* v. *Johnson*, 575 F.2d 1347, 1357-1358 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979) (citations omitted). The word "continuing" is not beyond the common understanding of jurors and adequately imparts, without further elaboration, the substance of the statutory element. See also *United States* v. *Nerone*, 563 F.2d 836, 844 n.4 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (approving instruction under 18 U.S.C. 1955 that statutory words "substantially continuous operation" should "be given their normal and customary meaning. What constitutes 'substantially continuous operation' is a question for you to decide"). In these circumstances, more specific instructions were not required. See *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir.), cert. denied, 454 U.S. 825 (1981); *United States* v. *Smith*, 635 F.2d 716, 720 (8th Cir. 1980); *United States* v. *Crockett*, 506 F.2d 759, 762 (5th Cir.), cert. denied, 423 U.S. 824 (1975); *United States* v. *Maude*, 481

F.2d 1062, 1075 (D.C. Cir. 1973); *Evans* v. *United States*, 349 F.2d 653, 658-659 (5th Cir. 1965).[4]

Moreover, the absence of a more particularized instruction could not have resulted in prejudice to petitioner. As petitioner appears to recognize in complaining about another portion of the instructions (Pet. 15-16),[5] the evidence of petitioner's numerous drug crimes, and the jury's verdict of guilty on those charges, clearly establishes that there was a "continuing series of violations." The verdict in this case plainly reflects the jury's conclusion that petitioner's drug trafficking involved "ongoing criminal activity." *United States* v. *Losada*, 674 F.2d 167, 173 (2d Cir.), cert. denied, 457 U.S. 1125 (1982). Thus, even assuming that "situations might exist which would indicate that a jury should be aided by definition of the words in this statute, [6] it was not error to refuse to do so in the straightforward

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[4]The cases upon which petitioner relies (Pet. 10-12) are not to the contrary. While those decisions indicate that the statutory term "continuing series" conveys the notion of related violations, they do not hold that a district court is required as a matter of law to explicate that element of the offense or that it is reversible error for the court to refer the jury to the commonly understood meaning of the phrase "continuing series."

[5]Contrary to petitioner's contention, the district court correctly instructed the jury that, in determining whether there was a "series of violations," it was entitled to consider all of the evidence in the case and was not limited to the offenses charged in the substantive counts of the indictment. See *United States* v. *Sterling*, No. 82-1640 (9th Cir. Sept. 10, 1984), slip op. 3959; *Sperling* v. *United States*, 692 F.2d 223, 226 (2d Cir. 1982), cert. denied, No. 82-1391 (June 20, 1983); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 457 U.S. 1136, 459 U.S. 843 (1982); *United States* v. *Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975).

[6]Of course, petitioner can challenge the instructions only in the context of his case and not as they might be applied in other circumstances. See *New York* v. *Ferber*, 458 U.S. 747, 767 (1982); *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

context of this case." *United States* v. *Johnson*, 575 F.2d at 1358.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

MERVYN HAMBURG
Attorney

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[7]We also point out that the proposed instruction requested by petitioner —that "it would be insufficient to support a conviction on [the CCE] count if all you were to determine was that [petitioner] sold heroin to other people on a haphazard basis" (Pet. App. 30a) — was submitted in connection with the "organizer" element of the offense and not the "continuing series" element (see *id.* at 29a-30a). In any event, as discussed above, it was clear to the jury under the court's instructions that petitioner could not be convicted of CCE for "haphazard" criminal activity, and its verdict shows that it found that petitioner had engaged in ongoing drug trafficking.

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